

POSTED 10/27/11 **ORIGINAL**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of:

Cumulus Licensing LLC

Application for a Minor Change
For FM Translator W256BO

Application for a Covering License
For FM Translator W255CJ

Facility Id. No. 148550

FCC File No. BPFT-20110711AEI

FCC File No. BLFT-20110915ACL

To: Office of the Secretary
Attn: Chief, Audio Division, Media Bureau

OCT 24 2011
Federal Communications Commission
Office of the Secretary

REPLY OF COX RADIO, INC.
TO OPPOSITION PETITION FOR RECONSIDERATION

Cox Radio, Inc. ("Cox"), by its attorneys, and pursuant to Section 1.106(h) of the Commission's rules, hereby submits this Reply to the Opposition to Petition for Reconsideration (the "Opposition") of Cumulus Licensing, LLC ("Cumulus") regarding the above-captioned license application and construction permit application (the "Application") for FM translator W255CJ (the "Translator"). In Cox's Petition for Reconsideration (the "Petition"), Cox asks the Media Bureau to restore the Application to pending status because, among other things, (1) Cumulus apparently was able to secure the grant by entering into an agreement with the applicants for seven mutually exclusive FM translator applications in apparent violation Section 311(c) of the Communications Act of 1934, as amended;¹ (2) the grant was inconsistent with the processing freeze set forth in the *Third*

¹ 47 U.S.C. § 311(c). The seven applicants are hereinafter referred to as the "MX Translator Applicants" and the applications are referred to as the "MX Translator Applications." See Petition, at 3 n. 5 (providing file numbers for each of the MX Translator Applications).

Further Notice of Proposed Rulemaking in the Creation of a Low Power Radio Service,² and (3) the Translator will receive substantial interference from WSB-FM. In its Opposition, Cumulus accepts the risk from any incoming interference,³ but the Opposition fails to refute Cox's first two points. Accordingly, the Bureau should rescind its grant of the Application and restore it to pending status subject to the outcome of the *LPFM Third Further Notice*.

I. Neither the Text of Section 311(c) Nor the Commission's Rules, Policies, or Precedent Supports Cumulus's Argument that Section 311(c) Does Not Apply to an Agreement to Secure the Dismissal of the MX Translator Applications.

Cox's Petition demonstrated that, if Cumulus entered into an agreement to secure the dismissal of the MX Translator Applications, Cumulus violated Section 311(c) of the Communications Act of 1934, as amended, and the Commission's rules because Cumulus never submitted the agreement to the Commission for approval. Cumulus does not deny that it entered such an agreement. Instead, Cumulus claims that Section 311(c) and Section 73.3525 of the Commission's rules do not apply to the Translator. According to Cumulus, only applicants who are "mutually exclusive" must comply with Section 311(c) and Section 73.3525. Cumulus further explains that the Application was not "mutually exclusive" with the MX Translator Applications; rather, it was "contingent on the dismissal of the earlier-filed applications."⁴ This is a distinction without a difference. Tellingly, Cumulus cites no rule, precedent, or policy supporting its novel interpretation of Section 311(c) and Section 73.3525.

Cumulus's failure to cite any relevant authority is not surprising because the plain language of Section 311(c) of the Communications Act describes Cumulus's exact circumstances:

² Creation of a Low Power Radio Service; Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations, *Third Further Notice of Proposed Rulemaking*, 26 FCC Rcd 9986 (2011) ("*LPFM Third Further Notice*").

³ Opposition at 7.

⁴ Opposition at 3.

If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications.⁵

Between July 11, 2011 and September 6, 2011, the Application and the MX Translator Applications were “pending before the Commission” and “only one of which [could] be granted.” In its Opposition, Cumulus even admits that its Application “could not be granted” unless the MX Translator Applicants withdrew their applications.⁶ Therefore, if Cumulus entered into an agreement to secure the dismissal of the MX Translator Applications, that agreement was “unlawful” because Cumulus did not obtain Commission approval.⁷ Whether Cumulus classifies the Application as mutually exclusive or contingent on dismissal is irrelevant. Indeed, the words “mutually exclusive” or “contingent” appear nowhere in the text of Section 311(c).

Likewise, Section 73.3525(a) of the Commission’s rules does not support Cumulus’s strained interpretation of “mutually exclusive” or “contingent” applications. The words “mutually exclusive” and “contingent” do not appear in Section 73.3525(a).⁸ Rather, Section 73.3525(a) speaks broadly of construction permit applications that are in “conflict” with one another:

[W]henver applicants for a construction permit for a broadcast station enter into an agreement to procure the removal of a conflict between applications pending before the FCC by withdrawal or amendment of an application or by its dismissal pursuant

⁵ 47 U.S.C. § 311(c)(1). Cumulus does not dispute (and cannot dispute) that Section 311(c) and 47 C.F.R. § 73.3525 apply to FM translators. Under FCC rules, FM translators are “broadcast stations.” See 47 C.F.R. § 74.1201(a) (defining FM translator as a station in the “broadcasting service”).

⁶ Opposition at 3.

⁷ § 311(c)(1).

⁸ The words mutually exclusive do appear in Section 73.3525(b), but that paragraph, which describes special procedures for resolving conflicts when Section 307(b) considerations arise, is wholly inapplicable to the Application.

to § 73.3568, all parties thereto shall, within 5 days after entering into the agreement, file with the FCC a joint request for approval of such agreement.⁹

Under any reasonable interpretation, the MX Translator Applications and the Application were in conflict. The Application was short spaced to all of the MX Translator Applications. Thus, the Bureau could not grant the Application unless each of the MX Translator Applicants withdrew its application first. Cumulus's characterization of its Application does not change the central fact that the Application was in conflict with the MX Translator Applications. As a result, Cumulus was required to obtain Commission approval of any agreement to remove that conflict.

If Cumulus entered into an agreement with the MX Translator Applicants – and Cumulus never denies that it did – the Communications Act and the Commission's rules require Cumulus to submit that agreement to the Commission for approval.¹⁰ The Bureau cannot waive this statutory requirement. Moreover, if the Bureau learns that Cumulus paid the MX Translator Applicants more than their "legitimate and prudent expenses," the agreement would violate the Commission's rules and the Bureau would have to reject it.¹¹ Accordingly, under Section 311(c) and Section 73.3525, the Bureau must rescind its grant of the Application and order that Cumulus submit a copy of any agreements with the MX Translator Applicants.¹²

II. The Application Is Subject to the Processing Freeze Because Serial Translator Applications Are Deemed to be One Single Proposal.

Cox's Petition demonstrates that, once the Bureau rescinds its grant of the Application (because Cumulus violated of Section 311(c) and Section 73.3525), the Bureau must suspend

⁹ § 47 C.F.R. § 73.3525(a) (emphasis added).

¹⁰ *Hammock Environmental & Educ'l Community Servs.* 25 FCC Rcd 12804, 12809 (ASD 2010) (deferring action on an application "pending submission and review of the requisite documentation" required under Section 73.3525).

¹¹ § 73.3525(a)(3).

¹² 47 U.S.C. § 311(c)(3) ("The Commission *shall* approve the agreement *only if* it determines that the agreement is consistent with the public interest, convenience, or necessity.") (emphasis added).

processing of the Application because the Application violates the processing freeze imposed in the *LPFM Third Further Notice*. In response, Cumulus replies to arguments that Cox did not make: claiming that Cox hopes to “turn[] back the clock” on the Translator’s various prior moves.¹³ Then, Cumulus accuses Cox of seeking “unprecedented” relief – meanwhile Cumulus never refutes or even acknowledges the precedent cited in Cox’s Petition.¹⁴

Contrary to Cumulus’s suggestions, Cox seeks only modest relief. Once the Bureau rescinds its grant of the Application and restores it to pending status, the Bureau should suspend processing of the Application. Cox does not seek the outright dismissal of the Application, and Cox is not asking that the Bureau overturn its grant of any of the ten earlier minor change applications filed by the former licensee of the Translator. Instead, Cox merely asks that the Application remain pending subject to the outcome of the *LPFM Third Further Notice*.

Cox’s request is consistent with Commission and Bureau precedent. In the *LPFM Third Further Notice*, the Commission directed the Bureau to suspend processing of any pending FM translator application proposing to move into a “spectrum-limited” market.¹⁵ Cumulus does not (and cannot) dispute that, if it proposed to relocate the Translator directly from rural Tallapoosa, Georgia to downtown Atlanta, the Application would have been subject to the processing freeze. Instead, Cumulus claims that the Bureau should look at the Application in isolation and ignore the ten prior minor change applications hopscotching across Georgia.

Bureau precedent for serial translator applications, however, is clear: the Bureau does not treat each serial minor change as a new independent proposal.¹⁶ Rather, the Bureau considers serial

¹³ Opposition at 5.

¹⁴ See Petition at 7 (discussing *Letter to John F. Garziglia*, 26 FCC Rcd 12685, 12687 (2011) and *Broadcast Towers, Inc.*, Order and Consent Decree, 26 FCC Rcd 7681, 7686 (MB 2011)).

¹⁵ *LPFM Third Further Notice*, ¶ 31.

¹⁶ *Letter to John F. Garziglia*, 26 FCC Rcd 12685, 12687 (2011).

applications as an attempt to move an FM translator a far greater distance than would otherwise be allowed under Commission rules.¹⁷ Thus, Cumulus is not telling the entire story when it claims that the Application is merely “a power increase and channel change.”¹⁸ When viewed properly under *Garziglia*, the Application is the last construction permit application in a series of related applications moving the Translator from Tallapoosa to Atlanta. As the Bureau explained in *Garziglia*, a prospective LPFM applicant hoping to apply for Channel 255 (or an adjacent channel) in Atlanta would have a claim under *Ashbacker* to file a competitive application against the Translator.¹⁹

Perhaps recognizing that under *Garziglia* the Bureau does not turn a blind eye to serial modification applications, Cumulus asks that the Bureau ignore the Translator’s history because Cumulus claims it had no knowledge of it.²⁰ A simple search in CDBS, however, would have revealed that more than a dozen construction permit applications and license applications were filed for the Translator in less than two years. Moreover, in Section 7 of the Asset Purchase Agreement between Cumulus and Edgewater Broadcasting, Inc. (“Edgewater”), Cumulus directs Edgewater to file two of the construction permit applications for the Translator, and Cumulus agrees to pay all of Edgewater’s expenses for those applications.²¹ Given Cumulus’s clear role in at least three of the Translator’s minor change applications (the two Edgewater applications and the Application), the Bureau should reject Cumulus’s claim that it would be inequitable to apply the standard set forth in *Garziglia* to the Translator. Rather, the Bureau should deem the Application as a single proposal to move the Translator from Tallapoosa to Atlanta and, thus, subject to the processing freeze.

¹⁷ *Id.* (“The evident purpose of the serial applications is to achieve the prohibited result.”).

¹⁸ Opposition at 6.

¹⁹ *Garziglia*, 26 FCC Rcd at 12687.

²⁰ Opposition at 5 n.10.

²¹ See FCC File No. BALFT-20100723ADJ at Exb. 4.

III. Cox Has Standing in This Proceeding, and Cox Submitted Its Petition as Soon as Reasonably Possible Under the Circumstances.

Cumulus's claim that Cox does not have standing in this proceeding is without merit. Under longstanding precedent, Cox satisfies the "aggrieved party" test under Section 1.106(b)(1) because, as the licensee of WSB-FM, Atlanta, Georgia, it is an in-market competitor of Cumulus and the Translator.²² In addition, as Cox explained in its Petition, Cox could not possibly have known about the apparent violation of Section 311(c) until September 6, 2011, when the last MX Translator Application appears as dismissed in CDBS.²³ The Commission then granted the Application three days later. Cumulus acknowledges that the Section 311(c) argument is Cox's "leading argument,"²⁴ yet, apparently, Cumulus believes that Cox should have prepared an Informal Objection and filed it with the Commission within two days. The Commission, however, does not impose such strict standards. Instead, the Commission has long recognized that prompt staff action can prevent an opponent from filing an objection.²⁵ Under these circumstances, the Commission will not dismiss a petition for reconsideration as procedurally improper.²⁶ Moreover, the staff's immediate grant of the Application was facilitated by Cumulus's failure to comply with Section 311(c). If Cumulus had complied, Cox's opposition to the Application would have been filed before it were granted.

²² *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940); *CMP Houston-KC, LLC*, 23 FCC Rcd 10656, 10660 n.31 (2008); *Cloud Nine Broadcasting, Inc.*, 10 FCC Rcd 11555, 11556 (1995) (holding that as a licensee of an existing competitor, the petitioner's interests were adversely affected).

²³ Petition at 2 n.3.

²⁴ Opposition, at 2.

²⁵ *See Association for Community Education, Inc.*, 19 FCC Rcd 12682, ¶ 6 (2004).

²⁶ *Aspen FM, Inc.*, 12 FCC Rcd 17852, 17854 (1997) (holding that an in-market competitor has standing to file a petition for reconsideration even though it did not file an informal objection because the Bureau granted the application within five days).

CONCLUSION

The Bureau should rescind its grant of the Application and return it to pending status because Cumulus secured its grant by apparently violating Section 311(c) of the Communications Act and because the grant was inconsistent with the processing freeze set forth in the Commission's ongoing LPFM proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

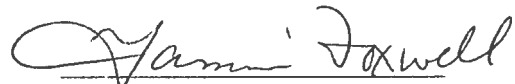
I, Tammi Foxwell, hereby certify that on this 24th day of October 2011, I caused a copy of the foregoing Reply of Cox Radio, Inc. to Opposition to Petition for Reconsideration to be served on the following:

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